82-2123

NO.___

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

W. THOMAS PLACHTER, JR.
and PETER J. SERUBO,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the dismissal of an indictment because of repeated, deliberate, and flagrant acts of prosecutorial misconduct before a grand jury falls within the scope of Section 3288 or 3289 of Title 18 of the United States Code, 18 U.S.C. §§ 3288, 3289, so as to permit reindictment of a defendant after the otherwise applicable statute of limitations has run.

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The Petitioners, W. Thomas Plachter, Jr. and Peter J. Serubo, respectfully pray to this Honorable Court that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in these proceedings on April 28, 1983.

I. OPINIONS BELOW

While no opinions were rendered by the United States Court of Appeals for the Third Circuit in the instant proceedings, the opinion of that Court in an earlier, related appeal is reported at 604 F.2d 807 (3d Cir. 1979). The unreported Judgment Orders of the Court of Appeals appear in the Appendix for Petitioners submitted hereto commencing at page 1. The Memorandum opinion of the United States District Court for the Eastern District of Pennsylvania appears in the Appendix for Petitioners commencing at page 5, and is reported at 502 F. Supp. 288 (E.D. Pa. 1980).

II. JURISDICTION

The Judgment Orders of the United States Court of Appeals for the Third Circuit were entered on April 28, 1983. The instant Petition for a Writ of Certiorari was filed within sixty (60) days of that date. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code, 28 U.S.C. § 1254(1).

III. STATUTORY PROVISIONS INVOLVED

Section 3288 of Title 18 of the United States Code, 18 U.S.C. § 3288, which provides:

> Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, or an indictment or information filed after the defendant waives in open court prosecution by indictment is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations.

Section 3289 of Title 18 of the United States Code, 18 U.S.C. § 3289, which provides:

> Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, or an indictment or information filed after the defendant waives in open court prosecution by indictment is found otherwise defective or insufficient for any cause, before the period prescribed by the appli-

cable statute of limitations has expired, and such period will expire within six calendar months of the date of the dismissal of the indictment or information, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the expiration of the applicable statute of limitations, or, if no regular grand jury is in session in the appropriate jurisdiction at the expiration of the applicable statute of limitations, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations.

IV. STATEMENT OF THE CASE

On March 13, 1978, Petitioners W. Thomas Plachter, Jr. ("Plachter") and Peter J. Serubo ("Serubo"), along with their co-defendant Donald H. Brown ("Brown"), were indicted by a federal grand jury for various counts of violation of the income tax laws and conspiracy. Plachter and Serubo were both charged with six counts of attempting to evade income taxes pursuant to 26 U.S.C. § 7201 and one count of conspiracy to defraud the Government and to attempt to evade income taxes pursuant to 18 U.S.C. § 371. Brown was charged with three counts of aiding and abetting and one count of conspiracy. The allegations of the indictment concerned Plachter's and Serubo's personal federal tax returns for the calendar years 1971 through 1973 and the returns of the Plachter-Serubo Cadillac Company ("the Company") for the same period. At their arraignments, all defendants entered pleas of not guilty to the counts in the indictment.

After the indictment had been returned, the defendants, based on certain materials obtained through limited discovery ordered by the United States District Court for the Eastern District of Pennsylvania and an

evidentiary hearing, moved to dismiss the indictment. These motions were based, *inter alia*, on the fact that the prosecutor had flagrantly abused the grand jury process.

These and other pretrial motions were denied by the District Court in late August and early September, 1978. *See United States v. Serubo*, 460 F. Supp. 689 (E.D. Pa. 1978) (per Newcomer, J.). On September 5, 1978, the defendants, by this time in possession of certain grand jury transcripts that had been furnished to them under a *Brady* request, *see Brady v. Maryland*, 373 U.S. 83 (1963), moved the District Court to reconsider its denial of their motions to dismiss based on the prosecutorial misconduct disclosed by those transcripts. Following oral argument on September 6, 1978, and after reviewing the grand jury testimony of only ten (10) of a total of approximately fifty (50) witnesses, the District Court found that the questioning of those witnesses by the prosecutor was "inconsistent with the standards laid down by the American Bar Association and was generally improper, reprehensible and unacceptable" and that there was "unprofessional, improper, and unacceptable conduct on the part of the prosecutor." *See United States v. Serubo*, 604 F.2d 807, 815-16 (3d Cir. 1979). Nevertheless, the District Court refused to dismiss or quash the indictment and refused to order discovery and inspection of the entire transcript of the grand jury's proceedings. *Id.* at 816.

After the District Court had denied these motions, Plachter and Brown pleaded guilty to the counts in the indictment against them, preserving, however, their right to appeal certain pretrial rulings as permitted by *United States v. Moskow*, 588 F.2d 882 (3d Cir. 1978), and *United States v. Zudick*, 523 F.2d 848 (3d Cir. 1975). The case against Serubo went to trial, but, before it was submitted to the jury, he too entered a conditional

guilty plea to some of the counts against him in exchange for the dismissal of the remaining counts.

Final judgments of sentence were entered against all defendants on November 3, 1978, and Plachter, Serubo and Brown thereafter appealed from the judgments of sentence entered against them.

On appeal, the United States Court of Appeals for the Third Circuit vacated the judgments of sentence that had been entered against the defendants. *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979) (per Gibbons, J.). In so doing, the Court of Appeals made its own findings regarding the prosecutorial misconduct that had occurred before the grand jury, characterizing the misconduct of the prosecutor as "extreme," and stated:

> The graphic and misleading reference to Cosa Nostra hatchet men, for example, was a blatant invitation to associate the defendants with a disfavored criminal class, and was inconsistent with the American Bar Association Standards Relating to the Prosecution Function. In particular, Pichini [the prosecutor] acted inconsistently with Standard 3.5(b), Relations with Grand Jury, admonishing that "[the prosecutor] should give due deference to [the grand jury's] status as an independent legal body," and that he "should not make statements or arguments in an effort to influence the grand jury action in a manner which would be inadmissible at trial before a petit jury." Certainly the reference to Frank Sindone's violent conduct and organized crime associations went far beyond what Standard 3.5 would permit. *See also* Standard 3.6(a). This conduct is fully as unsavory as that challenged in [*United States v.*] *Bruzgo* [373 F.2d 383 (3d Cir. 1967)] and [*United States v.*] *Riccobene* [451 F.2d 586 (3d Cir. 1971)]. And here, in addition, the partial transcript of the proceedings thus far released

> indicates that this conduct was only one of several instances of improper or borderline conduct before the grand jury.

Id. at 818.[1] *See id.* at 814-15.

The Court of Appeals remanded the case for consideration as to whether, *inter alia*, the prosecutorial misconduct displayed before a first, non-indicting grand jury had been repeated before or had otherwise tainted a second grand jury which actually returned the indictment. For purpose of the remand, the Court of Appeals ordered that the defendants be allowed to "examine the undisclosed transcripts of the second grand jury proceeding." *Id.* at 818-19. Finally, the Court of Appeals instructed that the proper remedy upon a demonstration that prosecutorial misconduct had tainted the second grand jury was dismissal of the indictment. *Id.* at 818.

On remand, the defendants filed with the District Court a supplemental motion for discovery which asked for that information to which the Court of Appeals stated they were entitled. They then renewed their motions to dismiss or quash the indictment.

On December 7, 1979, the District Court granted the defendants' discovery motion in part and ordered the Government to make available all transcripts of all of the proceedings before both grand juries, and the transcripts from the first grand jury that were provided to the second. *United States v. Serubo*, Crim. No. 78-0071, slip op. at 3 (E.D. Pa., Dec. 7, 1979) (per Newcomer, J.). The District Court also directed the Government to provide the defendants with any other evidence which showed

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1. Indeed, the misconduct of the prosecutor was of such an extreme nature that the Court of Appeals, in remanding the case for an evidentiary hearing, instructed the District Court, upon completion of the hearing, to furnish to the Attorney General of the United States copies of the transcripts reflecting prosecutorial misconduct so that the Justice Department could consider appropriate discipline. *United States v. Serubo, supra*, 604 F.2d at 819.

an evidentiary foundation for any of the questions which were challenged for lack of foundation, and granted defendants leave to depose the grand jury stenographer as to off-the-record proceedings. *Id.*

The Government chose not to fully comply with the District Court's Order of December 7, 1979. Instead, based upon its claim that further proceedings to resolve the issues underlying the renewed motions to dismiss would be lengthy and might compromise the indicting grand jury's investigations of other matters, and would therefore not be "in the public interest," the Government "consented" to the defendants' renewed motions to dismiss on the grounds of prosecutorial misconduct. The Government, however, purported to limit its consent to a dismissal of the indictment "without prejudice."

On April 29, 1980, over opposition from the defendants who submitted that any dismissal of the indictment must be "with prejudice," the District Court entered an order dismissing the indictment "without prejudice." *United States v. Serubo,* No. 78-0071, slip op. at 1-2 (E.D. Pa., April 29, 1980) (per Newcomer, J.). The District Court, however, did find that prosecutorial misconduct similar to that which occurred before the first grand jury had occurred before the second grand jury as well:

> The Court finds that dismissal of the indictment is required because of prosecutorial misconduct before the indicting grand jury. Specifically, the attorney for the government failed to lay an evidentiary foundation in linking the defendants to organized crime; he commented unnecessarily on the veracity of witnesses; and certain of the misconduct that occurred before the first grand jury was presented by way of transcripts to the second grand jury.

Id. at 1.

On July 2, 1980, Plachter, Serubo and Brown were again indicted by a federal grand jury for various counts

of violation of the income tax laws and conspiracy. This second indictment against the defendants was identical to the earlier indictment that was returned on March 13, 1978. At their arraignments, all of the defendants entered pleas of not guilty to the counts of this second indictment.

On September 15, 1980, the defendants moved the District Court to dismiss the second indictment alleging, *inter alia*, that the charges contained in the indictment were barred by the applicable statute of limitations.

On November 12, 1980, the District Court denied the motions to dismiss, holding, *inter alia*, that the reprosecution of the defendants was not barred by the statute of limitations. *United States v. Serubo*, 502 F. Supp. 288 (E.D. Pa. 1980) (per Lord, Ch.J.). *See* Appendix for Petitioners at 5. In denying defendants' motions to dismiss, the District Court held that, although the statute of limitation applicable to the offenses charged in the indictment had in fact run, reindictment pursuant to 18 U.S.C. §§ 3288 and 3289 was permitted whenever the first indictment was dismissed "for any reason," and the dismissal of an indictment because of prosecutorial misconduct did not bar a timely reprosecution under those statutes. *Id.* at 289-90. *See* Appendix for Petitioners at 6-7.

Trial commenced before the District Court, sitting with a jury of twelve, on May 10, 1982. At the commencement of trial, defendant Brown pleaded guilty to the aiding and abetting counts in the indictment in exchange for the dismissal of the conspiracy count against him. On May 28, 1982, Plachter and Serubo were found guilty as to the counts of the indictment against them.[2] Plachter and Serubo thereafter filed motions for judg-

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2. Certain of the counts against defendant Serubo had been previously dismissed as a result of his plea agreement with the Government under the first indictment. *See United States v. Serubo*, 502 F. Supp. 290 (E.D. Pa. 1980) (per Lord, Ch.J.).

ments of acquittal and for a new trial, which motions were denied by the District Court.

On September 13, 1982, a final judgment of sentence was imposed upon Plachter. Plachter filed a Notice of Appeal on September 22, 1982, appealing to the United States Court of Appeals for the Third Circuit from that judgment of sentence. A final judgment of sentence was imposed upon Serubo on October 6, 1982, and Serubo thereafter appealed from that judgment of sentence to the Court of Appeals.

On January 6, 1983, the Court of Appeals consolidated the separate appeals of Plachter and Serubo for briefing and disposition on the merits. On April 28, 1983, following oral argument,[3] the Court of Appeals affirmed the judgments of the District Court. *See* Appendix for Petitioners at 1-4.

V. REASONS FOR GRANTING THE WRIT

A. Preliminary Statement

The indictment against Plachter and Serubo charged violations of 26 U.S.C. § 7201 and 18 U.S.C. § 371, both of which are governed by a six-year statute of limitations. *See* 26 U.S.C. § 6531. The last overt act alleged in the indictment occurred on June 12, 1974.

The first indictment was dismissed by the District Court on April 29, 1980, which was less than six years after the last overt act alleged under the conspiracy and the charges regarding the Company's 1973 return and more than six years after the other substantive crimes alleged against Plachter and Serubo in that indictment. The second indictment was returned on July 2, 1980, more than six years after the last overt act alleged in the indictment and hence beyond the latest applicable limi-

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3. The transcript of the oral argument, which occurred on April 27, 1983, is set forth in the Appendix for Petitioners commencing on page 9.

tations date provided by 26 U.S.C. § 6531. Therefore, unless some provision operates to extend the otherwise applicable statutes of limitation, the charges in the second indictment are time-barred.

When an indictment is dismissed either because of an "error, defect or irregularity with respect to the grand jury," or because it is found "otherwise defective or insufficient for any cause," after the statute of limitations on the offense charged has expired, Section 3288 allows the Government to reindict a defendant within six months of the date of the dismissal. 18 U.S.C. § 3288. Where such a dismissal occurs before the expiration of the limitations period, Section 3289, Section 3288's companion provision, authorizes a similar six-month extension from the date the statute of limitations would otherwise expire.

Those statutes, however, are inapplicable to the circumstances of the case at bar. The egregious prosecutorial misconduct that triggered the dismissal of the initial indictment does not constitute the type of prosecutorial oversight or insufficiency contemplated by those "saving" statutes. Moreover, the Government's consent to the dismissal of the first indictment as "in the public interest" further removes this case from the coverage of Sections 3288 and 3289.

The issue decided by the Courts below, *i.e.*, whether prosecutorial misconduct of the degree which occurred in this case constitutes the type of defect with respect to the grand jury or with respect to the indictment itself that operates to relieve the Government from complying with the normally applicable statute of limitations, is an important question of federal law that goes to the integrity of the grand jury system and should be decided by this Court. Moreover, the decision that reindictment under Sections 3288 and 3289 is permissible whenever an initial indictment is dismissed literally "for any reason" represents such a radical departure from the accepted application of these sections as to warrant the exercise of

this Court's supervisory power. For these reasons, a writ of certiorari should issue to review the judgments of the Court of Appeals.

B. The Court Should Take This Opportunity to Settle the Issue of Whether the Dismissal of an Indictment Because of Repeated Acts of Extreme Prosecutorial Misconduct Falls Within the Scope of Section 3288 or 3289 So As To Permit Reindictment After the Otherwise Applicable Statute of Limitations Has Run.

1. Whether repeated acts of extreme prosecutorial misconduct constitute an "error, defect, or irregularity with respect to the grand jury."

Sections 3288 and 3289 provide, *inter alia*, that the statute of limitations will be extended for a period of six months "[w]henever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury. . . ." 18 U.S.C. §§ 3288, 3289. The Courts below implictly held that the error in this case, "extreme" and "unsavory" acts of prosecutorial misconduct, *see United States v. Serubo, supra*, 604 F.2d at 818, falls within that language of the "saving" statutes. That language, however, has never been so expansively interpreted.

All of the reported decisions permitting six-month extensions of the period within which reindictment must occur pursuant to the "error, defect, or irregularity" clause of the saving statutes have dealt with irregularities of a purely ministerial nature regarding the selection or convening of the grand jury returning the indictment or with technical violations of Rule 6 of the Federal Rules of Criminal Procedure.[4] The Second Cir-

4. *United States v. Macklin*, 535 F.2d 191, 193 (2d Cir. 1976) (indicting grand jury lacked jurisdiction in that its term had expired

cuit has summarized the interpretative history of the tolling statutes:

> The six-month extension of time after the dismissal of an indictment is provided by 18 U.S.C. § 3288 and is available only if the dismissal is for *technical* defects or irregularity in the grand jury. *United States v. DiStefano*, 347 F. Supp. 442, 444-45 (S.D.N.Y. 1972); *United States v. Moriarty*, 327 F. Supp. 1045, 1047-48 (E.D. Wis. 1971).

United States v. Grady, 544 F.2d 598, 601 n.3 (2d Cir. 1976) (emphasis added).

In addition, the statutory language is expressly limited to "errors, defects, or irregularities" *with respect to the grand jury itself.*[5] *See, e.g., United States v. Hill,*

NOTE — *(Continued)*
prior to the handing down of the indictment); *United States v. Ponder*, 444 F.2d 816, 822 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972) (grand jury improperly constituted); *United States v. Newman*, 534 F. Supp. 1109, 1111 (S.D.N.Y. 1982) (unauthorized Special Assistant United States Attorneys in grand jury room in violation of Fed. R. Crim. P. 6(d)); *United States v. Hill*, 494 F. Supp. 571, 573 (S.D. Fla. 1980) (an indictment by an invalidly empaneled grand jury is an "error, defect, or irregularity" within the meaning of Section 3288); *United States v. Zirpolo*, 334 F. Supp. 756, 758-59 (D.N.J. 1971) (grand jury improperly selected); *United States v. Hoffa*, 196 F. Supp. 25, 31-32 (S.D. Fla. 1961) (limiting of selection of names for grand jury to registered voters, women volunteers for jury service in state courts, and jurors selected for service in state courts was improper and rendered indictment invalid).

5. Penal statutes must be strictly construed against the government or parties seeking to exact statutory penalties and in favor of persons on whom such penalties are sought to be imposed. *Busic v. United States*, 446 U.S. 398 (1980); *United States v. Scharton*, 285 U.S. 518 (1932). In addition, a criminal statute of limitations is to be construed liberally in favor of a criminal defendant. *United States v. Richardson*, 512 F.2d 105 (3d Cir. 1975); *United States v. Moriarty*, 327 F. Supp. 1045, 1047 (E.D. Wis. 1971). Accordingly, Sections 3288 and 3289, which are intended to extend the period of a criminal statute of limitations in favor of the Government, must be

494 F. Supp. 571, 573 (S.D. Fla. 1980) (an indictment by an invalidly empaneled grand jury is an "error, defect, or irregularity" within the meaning of Section 3288). The view of the Courts below, that this was simply another dismissal for a technical "error, defect, or irregularity with respect to the grand jury," expands the reach of the savings statutes beyond the area of prosecutorial *oversight* to encompass the area of deliberate prosecutorial *overreaching*. No evidence of congressional intent to give the statutes such a breathtaking scope is found in either the legislative history of Sections 3288 and 3289 or the plain language of the statutes.

2. Whether repeated acts of extreme prosecutorial misconduct render an indictment "otherwise defective or insufficient for any cause."

Sections 3288 and 3289 also provide that the statute of limitations will be extended for a period of six months whenever an indictment is dismissed on a finding that the indictment was "otherwise defective as insufficient for any cause." In permitting reindictment of the defendants in the instant case, the Courts below in effect held that a dismissal of the indictment on grounds of repeated acts of extreme prosecutorial misconduct before the grand jury meant that the initial indictment was "otherwise defective or insufficient" within the meaning of Sections 3288 and 3289. The statutory language, however, has never been applied to permit reindictment where a first indictment was dismissed because of such prosecutorial misconduct.

All of the reported decisions permitting six-month extensions of the period within which indictment must

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NOTE — *(Continued)*
strictly construed against the Government and liberally construed in favor of the defendants. *United States v. Durkee Famous Foods, Inc.*, 306 U.S. 68, 71 (1939); *United States v. Moriarty, supra*, 327 F. Supp. at 1047.

occur pursuant to the "otherwise defective or insufficient for any reason" clause have dealt exclusively with two types of cases: (a) those in which the initial indictment was dismissed because of a technical violation of Rule 7 or Rule 8 of the Federal Rules of Criminal Procedure; or (b) those in which the initial indictment was dismissed as "insufficient" for failure to state an offense.[6]

Moreover, the statutory language is expressly limited to these cases where the indictment *itself* is "found otherwise defective or insufficient." There can be no claim here that the initial indictment in this case was "defective or insufficient." *See United States v. DiLorenzo*, 49 F.R.D. 86, 91 (S.D.N.Y. 1969), *citing*, *Costello v. United States*, 350 U.S. 359, *reh. denied*, 351 U.S. 904 (1956) (an indictment returned by a duly constituted grand jury is sufficient if valid on its face). On

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6. *United States v. Charnay*, 537 F.2d 341, 353-55 (9th Cir.), *cert. denied subnom., Davis v. United States*, 429 U.S. 1000 (1976) (failure to state an offense); *United States v. Porth*, 426 F.2d 519, 521-22 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970) (indictment dismissed as "defective and insufficient" for "technical reasons"); *Mende v. United States*, 282 F.2d. 881 (9th Cir. 1960), *cert. denied*, 364 U.S. 933, *reh. denied*, 365 U.S. 825 (1961) (indictment dismissed for "insufficiency"); *United States v. Kearney*, 451 F. Supp. 33, 39 n.3 (S.D.N.Y. 1978) (indictment dismissed as "'duplicitous" in violation of Fed. R. Crim. P. 8(a)); *United States v. Civic Plaza National Bank*, 390 F. Supp. 1342, 1344-45 (W.D. Mo. 1974) (indictment dismissed for failure to comply with Fed. R. Crim. P. 7); *United States v. Bair*, 221 F. Supp. 171 (E.D. Wis. 1963) (indictment dismissed as "duplicitous"); *United States v. Main*, 28 F. Supp. 550, 552 (S.D. Tex. 1939) (indictment failed to charge the commission of offenses against the laws of the United States").

With respect to *United States v. Civic Plaza National Bank, supra*, it should be noted that in that case, the District Court *strictly* construed Section 3288 in holding that a new prosecution can be instituted and avoid the bar of limitations only if it is instituted by an indictment, and a prosecution commenced by the filing of an information after an indictment has been dismissed was barred by the statute of limitations. *Id.* at 1344-45.

the contrary, the first indictment in this case was facially valid, and it was the "extreme" misconduct on the part of the prosecution which mandated the dismissal of that facially valid indictment. The language of Sections 3288 and 3289 simply may not be construed to expand the reach of those sections beyond cases where the *indictment itself* is defective or insufficient.

Because of the potentially far-reaching impact of the interpretation adopted by the Courts below upon the public perception of the integrity of grand juries, this Court should grant the instant Petition and review the judgments of the Court of Appeals.

C. The Decisions of the Courts Below Permitting Reindictment Pursuant to Sections 3288 and 3289 Whenever an Initial Indictment Is Dismissed "For Any Reason" Represent Such a Radical Departure From the Accepted Application of Those Statutes As to Warrant the Exercise of the Supervisory Power of This Court.

The District Court held that "if an indictment is dismissed *for any reason*, § 3288 can 'save' a timely reindictment." *United States v. Serubo*, *supra*, 502 F. Supp. at 289 (emphasis added).[7] *See* Appendix for Peti-

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7. The District Court's express reliance upon the decisions in *United States v. Charnay*, 537 F. 2d 341 (9th Cir.), *cert. denied sub nom., Davis v. United States*, 429 U.S. 1000 (1976), and *United States v. Macklin*, 535 F.2d 191 (2d Cir. 1976), as support for its broad interpretation of Sections 3288 and 3289 is misplaced in that the specific technical defects which mandated the dismissal of the initial indictments in those cases were clearly within the accepted meaning of the saving statutes. In *Charnay*, the Ninth Circuit, relying upon the "for any cause" language of Section 3288, broadly stated that "a second indictment may properly be returned within the prescribed six-month period where the dismissal of the first indictment is due to *a legal defect*. . . ." *United States v. Charnay*, *supra*, 537 F.2d at 355 (emphasis added). The first indictment in *Charnay*, however, was dismissed simply because it failed to state

tioners at 6-7. If it were the intent of Congress that Sections 3288 and 3289 should apply to all cases where an indictment is dismissed "for any reason," Congress would have said simply that and nothing more. The interpretation adopted by the Courts below renders meaningless all of the other qualifying words in the statutes and is a radical departure from the consistently strict interpretation of those statutes followed by other courts since their enactment.

For example, where an indictment is dismissed because of the Government's conduct in continually delaying the trial of the case, it has been held that there was no technical defect or irregularity as contemplated by the statutory language. *United States v. DiStefano*, 347 F. Supp. 442, 444-45 (S.D.N.Y. 1972).[8] Likewise,

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NOTE — *(Continued)*

an offense. This failure was exactly the type of technical error to which Section 3288 has been held to apply.

Similarly, in *Macklin*, the Second Circuit concluded that "§ 3288 was meant to apply whenever the first charging paper was vacated *for any reason whatever*, including lack of jurisdiction." *United States v. Macklin, supra*, 535 F.2d at 193 (emphasis added). The specific defect in *Macklin*, however, was precisely lack of jurisdiction; *i.e.*, the term of the grand jury which returned the original indictment had expired prior to the handing down of the indictment, and the original indictment was therefore a nullity. There, as in *Charnay*, the defect was exactly the type of technical error to which Section 3288 has been held to apply. The sweeping conclusion of the *Macklin* Court that Section 3288 applies whenever an indictment is dismissed "for any purpose whatever" is therefore dictum, and cannot be read to expand the scope of Sections 3288 and 3289 to the limits suggested by the Courts below.

8. In *United States v. DiStefano*, 347 F. Supp. 442 (S.D.N.Y. 1972), the District Court denied the Government's motion to reinstate a previously dismissed indictment after the five-year statute of limitations applicable to the charges against the defendant had expired, holding the six-month extension authorized by Section 3288 or 3289 inapplicable. Because the Government's own dilatory conduct had been the cause of the dismissal, the Court found that there was not a technical defect or irregularity as contemplated by those statutes:

dismissals of indictments effected at the Government's insistence and discretion are not controlled by Sections 3288 and 3289.[9] *E.g., United States v. Moriarty*, 327 F. Supp. 1045, 1047-48 (E.D. Wis. 1971).[10]

Thus, where a dismissal is due to intentional government conduct, such as the agreement to a dismissal "in the public interest,"[11] or the repeated pattern of mis-

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NOTE — *(Continued)*

> The motion must be denied because the statute of limitations having run, the Court is without power to reinstate the indictment. *When an indictment is dismissed because of technical defect or irregularity in the grand jury*, a new indictment may be returned within six months of the date of dismissal even though the statute of limitations has run or might run in the interim. 18 U.S.C. §§ 3288, 3289. However, *where the indictment has been dismissed for failure to prosecute, reindictment is not possible once the statute of limitations expires. See United States v. Strewl*, 99 F.2d 474 (2d Cir. 1938), *cert. denied*, 306 U.S. 638, 59 S. Ct. 489, 83 L. Ed. 1039 (1939); *United States v. Moriarty*, 327 F. Supp. 1045 (E.D. Wis. 1971).

Id. at 444-45 (emphasis added).

9. *See DeMarrias v. United States*, 487 F.2d 19, 21 (8th Cir. 1973), *cert. denied*, 415 U.S. 980 (1974). When the Government seeks leave to dismiss an indictment pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure, neither Section 3288 nor 3289 applies. *United States v. German*, 355 F. Supp. 679, 682 (D.P.R. 1972). *See* 3 C.A. Wright, *Federal Practice and Procedure: Criminal* § 811 at 195 n.10 (2d ed. 1982).

10. In *United States v. Moriarty*, 327 F. Supp. 1045 (E.D. Wis. 1971), the initial indictments had been dismissed upon the Government's declaration " 'that the interest of justice demands no further prosecution.' " *Id.* at 1047. The District Court refused to permit reindictment under Section 3288, holding that that statute embraced only dismissals on account of irregularities in the grand jury process, not those at the prosecution's behest as to the "interest of justice." *Id.* at 1047-48.

11. In view of the fact that the Government in the case at bar consented to the dismissal of the first indictment shortly after the District Court ordered extensive discovery, including the depositions of certain Special Agents of the IRS, other involved parties and

conduct present in this case, the courts have consistently held that the Government may not benefit from Section 3288 or 3289. The decisions below, therefore, represent a radical break from that consistent line of case law.

This departure warrants the exercise of this Court's supervisory power, and, accordingly, a writ of certiorari should issue to review the judgments of the Court of Appeals.

NOTE — *(Continued)*
the grand jury stenographer, *United States v. Serubo*, Crim. No. 78-0071 (E.D. Pa., Dec. 7, 1979) (per Newcomer, J.), it is inferable that the Government's consent to the dismissal of the first indictment was based more on a desire to avoid additional discovery, with its attendant risk of further exposure and embarrassment, as upon the "public interest." In either event, the Government's consent to the dismissal was not based on any defect or irregularity of the type contemplated by Sections 3288 and 3289.

In addition, the Government's consent to the defendants' motions to dismiss the first indictment rendered it not substantively different from a dismissal initiated by the Government pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure. Rule 48 would have required the defendants' consent to the Government's request for a dismissal in that jeopardy had attached by virtue of the earlier pleas of guilty. *See, e.g., United States v. Bullock*, 579 F.2d 1116, 1118 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978); *United States v. Young*, 503 F.2d 1072, 1074 n.5 (3d Cir. 1974); *United States v. Jerry*, 487 F.2d 600, 606 (3d Cir. 1973). Likewise, Rule 48 requires approval by the Court of a Government initiated dismissal. Fed. R. Crim. P. 48(a). Accordingly, although there may be a distinction between the Government's consent to the defendants' motions to dismiss and its filing of a dismissal requiring the consent of the defendants and leave of Court, that distinction is one without a difference. Since Sections 3288 and 3289 do not control discretionary dismissals of this type, the second indictment should be considered barred by the statute of limitations. *See DeMarrias v. United States*, 487 F.2d 19, 21 (8th Cir. 1973), *cert. denied*, 415 U.S. 980 (1974).

VI. CONCLUSION

For the foregoing reasons, Petitioners W. Thomas Plachter, Jr. and Peter J. Serubo respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit.

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Respectfully submitted,

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Clerk of the United States Court of Appeals
for the Third Circuit